STATE OF MICHIGAN

COURT OF APPEALS

THERESA MARIE AVOURIS,

Plaintiff-Appellee,

v

GREGORY VINCENZO RASA,

Defendant-Appellant.

UNPUBLISHED
September 17, 2009

No. 291045
Macomb Circuit Court
Family Division
LC No. 2002-002204-DS

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right an order granting a motion for change of domicile in favor of plaintiff. The order permitted plaintiff to move from Utica, Michigan to Wellston, Michigan with the parties' minor child. We affirm.

Pursuant to MCL 722.28, "[t]his Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A finding of fact is not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). In a child custody context, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, *supra* at 705.

As an introductory matter, defendant argues that the trial court should have required plaintiff to show that the change in domicile was in the best interests of the child by clear and convincing evidence because the child had an established custodial environment with both parties. We disagree.

Where there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence. *Sinicropi v Mazurek*, 273 Mich App 149, 178; 729 NW2d 256 (2006), citing *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). "[T]he trial court is not required to consider the best-interest factors until it first determines that the [domicile] modification actually changes the children's established custodial environment." *Rittershaus v Rittershaus*, 273 Mich App 462, 470-471; 730 NW2d 262 (2007). Where the change in domicile will not affect the established custodial environment, the moving party has

only "the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000).

The parties in this case had joint custody of the child, but plaintiff, the child's mother, had full physical custody. The trial court found that an established custodial environment only existed with plaintiff. Defendant argues that this finding was against the great weight of the evidence. He contends that the child had an established custodial environment with him as well, and because of this the trial court clearly erred by not requiring plaintiff to show by clear and convincing evidence that the change in domicile was in the child's best interests. This argument requires a review of whether the trial court's finding that there was not an established custodial environment with defendant was against the great weight of the evidence.

MCL 722.27(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Whether an established custodial environment exists is a question of fact. *Foskett*, *supra* at 8. An established custodial environment can exist with both parents, even if the child's primary residence is with one parent and the same parent provides most of the financial support for the child. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). Further, an established custodial environment is one of significant duration, both physical and psychological, "in which the relationship between the custodian and child is marked by security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Defendant has not established that the trial court's finding that an established custodial environment only existed with plaintiff is against the great weight of the evidence. In determining that the child's established custodial environment was with plaintiff, the trial court noted that the child primarily lived with plaintiff and that he attended school from plaintiff's home. The trial court found that both plaintiff and defendant had participated in the child's school life and attended doctor's appointments. However, the trial court also found that the parties had conducted themselves in a way in which the mother primarily had physical custody. Although testimony indicated that the child looked to defendant for his needs while in defendant's care and there were periods of time where defendant's time with the child was more than what was scheduled, defendant can point to no testimony establishing that the child also looked to him for guidance, discipline, and parental comfort on a day-to-day basis. Their relationship does not have the characteristic of permanence and stability that is emblematic of an established custodial environment. See *id*. Thus, we conclude that the trial court's finding that the child's established custodial environment lay solely with plaintiff was not against the great weight of the evidence. Therefore, plaintiff only needed to prove that the change in domicile was warranted by a preponderance of the evidence. See *Mogle*, *supra* at 203.

Where, as here, a parent petitions the court to change the legal residence of the child to a location that is more than 100 miles from the child's legal residence, the trial court must consider the following factors, set forth in MCL 722.31(4), before permitting the change:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

The trial court's determination that the change in domicile had "the capacity to improve the quality of life for" plaintiff and the child, as provided in MCL 722.31(4)(a), comported with the evidence presented at the hearing. The trial court based this finding on plaintiff's marriage planned for August 2009 to her fiancé, Michael Gelowski, who lived in Wellston. The trial court also based this finding on plaintiff's new employment as an event hostess at the Little River Casino in Manistee, after she was unable to find suitable employment in the area where she currently lived. Additionally, the trial court found that the move would improve the quality of life for the child. It based this finding on the benefit of being in an improved situation with plaintiff and the quality of the rural environment that the child would be living in.

Defendant argues that the trial court's finding on this factor went against the great weight of the evidence. First, defendant argues there was no evidence of a qualitative comparison between Utica and Wellston schools. Although the trial court did not make any specific findings about the quality of the schools, the principal of Wellston Elementary did testify that Wellston was an excellent school that could meet the needs of the parties' child. The principal noted that the school was limited in extracurricular activities, but he did state that scouting and baseball were particularly popular. Further, defendant has presented no evidence to suggest that Wellston is an inferior school district. Therefore, there is nothing on the record with regard to the school that would go contrary to the trial court's quality of life findings.

Defendant also argues that the trial court did not give enough weight to plaintiff routinely bringing the child to school late. However, the trial court did address the frequent tardiness. It found that although the tardiness was problematic, there was no evidence that it had affected the child's schoolwork or harmed the child in his move from kindergarten to first grade. Further, this issue has little to do with allowing the change in domicile because there was testimony that

defendant had been unable to help the child get to school on time because of his own work schedule.

Defendant also argues that it was impossible for the trial court to make an informed quality of life finding at all because there was no testimony from or about how Gelowski treated the child. Although Gelowski was not at the hearing due to a work obligation, there was testimony from plaintiff that she and Gelowski had scheduled a wedding date for August 2009. There was also testimony about Gelowski's family business of rental cabins in Wellston. The fact that plaintiff was planning to get married to Gelowski was part of the rationale behind the trial court's conclusion that she and the child would be improving their quality of life. Additionally, there is no evidence that Gelowski would mistreat the child. Defendant also submits that plaintiff's work schedule is now 2:00 p.m. to 10:00 p.m., not 8:00 a.m. to 4:00 p.m. However, defendant provides no support for this allegation beyond the bald assertion included in his brief. Therefore, we conclude that the trial court's quality of life findings were not against the great weight of the evidence.

With respect to MCL 722.31(4)(b), the evidence supports the trial court's findings that the parties had cooperated with regard to parenting time and that plaintiff's move to Wellston was not "inspired by [her] desire to defeat or frustrate the parenting time schedule." Although the trial court found that the move would partially impair defendant's parenting time, it also found that plaintiff was willing to put forth a lot of effort to provide defendant with adequate time. The trial court also found that both parties had complied with the existing parenting time order.

Defendant contends that plaintiff was not adhering to the parenting time order and that she had further violated it by already moving to Wellston prior to seeking permission. Defendant testified that he was not receiving adequate time as stated in the order. However, the time defendant referred to was tied to a provision regarding plaintiff's work schedule. As the trial court found, because plaintiff's work schedule changed, that provision had lapsed in 2005. Also, there was support for the trial court's finding that plaintiff had not moved because the principal of Wellston Elementary testified that the child was not formally enrolled in the school and plaintiff's own testimony, which the court found credible. Although there was testimony that she was offered a job at the Wellston Elementary School that would begin on November 11, 2008, plaintiff did not take this job. Therefore, the trial court's finding that both plaintiff and defendant had complied with the scheduling order was not against the great weight of the evidence.

Given the parties' past cooperation in relation to parenting time, the trial court also properly determined that the parties would comply with the modified parenting time order pursuant to MCL 722.31(4)(c). Defendant does not contest this finding. Moreover, we also agree with the trial court's finding that it is "possible to order a modification of the parenting time schedule" in this case and adequately preserve and foster the parent-child relationship. See MCL 722.31(4)(c). Defendant argues that the trial court did not make a finding in this regard. Further, defendant contends it would not be possible to order a modification that would preserve and foster his relationship with the child.

Despite defendant's contention, the trial court did make findings on this issue. As the trial court found, although the distance would be formidable, other avenues of modern communication technology, including the use of a web cam, would enable defendant to preserve

and foster a relationship with the child. Further, plaintiff offered to drive to a half way meeting point to transfer the child to defendant and to let defendant take the child for extended holidays when his school schedule allowed. Based on this evidence, the trial court did not clearly err by finding that there was an adequate basis for preserving and fostering the parental relationship between defendant and the child.

The record also supports the trial court's finding that defendant's motivation for opposing the move was in no way related to a desire to secure a financial advantage with respect to a support obligation. See MCL 722.31(4)(d). Defendant does not contest this finding. Finally, with regard to MCL 722.31(4)(e), the trial court found that domestic violence is not an issue in this case and defendant does not contest this finding.

In sum, based on evidentiary support for the trial court's findings that the move would have the capacity to improve the quality of life for plaintiff and the child and that defendant would be able to foster and preserve a relationship with the child, we conclude that the trial court did not abuse its discretion in ruling that a change of domicile was warranted under MCL 722.31(4).

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra